Filed 3/24/09 Eardley v. Downey Savings and Loan Assn. CA2/4

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

JON EARDLEY, Plaintiff and Appellant, v. DOWNEY SAVINGS AND LOAN ASSOCIATION, et al., Defendants and Respondents.	B204861 (Los Angeles County Super. Ct. No. BC379528)

APPEAL from an order of the Superior Court of Los Angeles County, Ann I. Jones, Judge. Dismissed.

Law Offices of Jon Eardley and Jon Eardley, in propria persona, for Plaintiff and Appellant.

Snyder Law, Barry Clifford Snyder and Sean R. Burnett for Defendant and Respondent Downey Savings and Loan Association.

Garrett & Tully, Ryan C. Squire and Jennifer R. Slater for Defendant and Respondent Pacifica Mortgage Fund.

INTRODUCTION

This purported appeal is prosecuted by Jon Eardley, a licensed attorney. It arises out of the following circumstances. In a lawsuit in which he was representing his wife, appellant presented an ex parte application to the trial court to stay pending foreclosure sales. Appellant falsely represented that he had given the defense notice of his application. Further, appellant failed to disclose that his application had been previously presented to other bench officers. The trial court, unaware of the true circumstances, granted the stay order. Upon learning of the stay order, the defendants quickly moved to vacate it. The trial court vacated the stay. In addition, it granted a defense request for $3,755 sanctions to be paid by appellant and his wife to cover costs and fees incurred in bringing the motion to vacate. Appellant challenges the award of monetary sanctions. The contested order is nonappealable. We therefore shall dismiss the purported appeal.

FACTUAL AND PROCEDURAL BACKGROUND[1]

This matter arises out of an ultimately unsuccessful attempt to enjoin non-judicial foreclosure sales of residential property located in Whittier. The property was originally owned by appellant's mother-in-law Thelma Spirtos (Spirtos). Thereafter, both appellant and his wife, Michelle Eardley, became, along with Spirtos, owners in joint tenancy of the property. Respondents in this matter are Downey Savings and Loan Association (Downey) and Pacifica Mortgage Fund,

---

[1] The facts are gleaned from appellant's appendix and respondent Pacifica's appendix as well as the material submitted by the parties pursuant to various motions. On February 24, 2009, we granted Pacifica's June 27, 2008 request to take judicial notice, Pacifica's November 19, 2008 request for judicial notice, appellant's January 21, 2009 request for judicial notice, and appellant's February 6, 2009 request to submit "supplemental excepts of record."

LLC (Pacifica). Each had recorded deeds of trust against the property to secure loans made to Spirtos.

In 2007, Spirtos and appellant filed an action against Downey and Pacifica. Appellant was counsel of record. The complaint alleged, among other things, that their recordation of Notices of Rescission of Trust Deeds prevented the lenders from proceeding by way of non-judicial foreclosure. For purposes of clarity, we shall refer to this action as the first lawsuit.[2] The case was assigned to Judge Elizabeth White.

Several months later, Pacifica and Downey recorded notices of trustee's sale for, respectively, September 27 and October 5. In response, appellant filed, as part of the first lawsuit, an ex parte application to stay the non-judicial foreclosure sales. Pacifica filed opposition. Both Pacifica and Downey appeared at the hearing. The matter was heard by Judge David Workman because Judge White was not available. On September 26, Judge Workman stayed the two foreclosure sales until noon on October 29. Thereafter, Pacifica re-noticed its foreclosure sale for 12:01 p.m. on October 29.

On October 22, appellant's wife Michelle Eardley, represented by John C. Torjesen (Torjesen), filed a "Complaint to Enjoin Foreclosure, and for Declaratory Relief," against Pacifica and Downey. We shall refer to this action as the second lawsuit.[3] Essentially, it sought the same relief as the first lawsuit but with a different plaintiff. The case was assigned to Judge Susan Bryant-Deason.

Appellant filed an ex parte application for a restraining order and/or injunction in the second lawsuit. On October 25, Judge Bryant-Deason directed

---

[2] It is Los Angeles Superior Court Case No. BC368163.

[3] It is Los Angeles Superior Court Case No. BC379528.

him to file the application with Judge David Yaffe in Writs and Receivers (Dept. 86). Appellant complied but apparently Judge Yaffe did not rule on the request.

On Friday, October 26, appellant filed an ex parte application in the second lawsuit to stay all non-judicial foreclosure proceedings. The captions on the application and supporting declarations indicated that both appellant and Torjesen were representing Michelle Eardley. The application, signed by appellant as counsel for the moving party, falsely represented that notice had been given to Pacifica and Downey and that those entities did not oppose the requested relief when, in fact, neither had received notice of the ex parte application. In addition, appellant's application made no reference to the first lawsuit, to the stay order issued by Judge Workman on September 25, or to the prior applications for relief filed with Judge Bryant-Deason or Judge Yaffe. Instead, the application claimed: "Plaintiff has not previously applied for to [*sic*] any judicial officer for this relief." Because Judge Bryant-Deason's court was dark, the matter was referred to Judge Ann Jones. Appellant did not inform Judge Jones about Judge Bryant-Deason's direction that any such an application should be filed in Writs and Receivers. That day (Oct. 26), Judge Jones issued an order granting the "unopposed" application. She stayed the non-judicial foreclosure sales and found that the trust deeds had been rescinded.

At approximately 6:10 p.m. that day (Oct. 26), Pacifica learned about the stay order, only because appellant had faxed a copy of it to the foreclosure trustee who, in turn, forwarded it to Pacifica. On Sunday, October 28, Pacifica notified appellant (as well as Torjesen) by FAX and email that it would present an ex parte application on Monday October 29 to vacate the October 26 stay order.

On October 29, Pacifica filed its motion to vacate. It argued that the October 26 order was void because it had not received notice of the underlying application. Pacifica characterized the second lawsuit as an attempt to forum shop

and avoid foreclosure. Pacifica sought $3,755 in sanctions against Michelle Eardley and her counsel for fees and costs incurred in moving to set aside the October 26 order. A declaration from Pacifica's counsel supported the sanctions request.

In addition, Pacifica's motion pointed out that in 2003 the trial court in San Bernardino had found that Michelle Eardley was a vexatious litigant (§ 391, subd. (b))[4] and that appellant acted as a conduit for her to pursue legal actions. Both were made subject to a prefiling order. (§ 391.7.) That ruling was upheld on appeal. (*Spirtos, et al. v. Spirtos, et al.* (Mar. 8, 2005, E034900, E035878 [nonpub. opn.].)

Appellant, having received notice of Pacifica's motion to vacate, filed on October 29 two declarations opposing the request. Appellant claimed, among other things, that he had notified Pacifica and Downey about his ex parte application.

On October 29, the court conducted a hearing at which appellant, Torjesen, Pacifica and Downey[5] appeared. Appellant never objected that he had not received adequate notice of the hearing and never sought a continuance to prepare

---

[4] Undesignated statutory references are to the Code of Civil Procedure.

[5] Pacifica had informed Downey about the most recent developments in the second lawsuit.

for the hearing.[6] Instead, he engaged in a lengthy exchange with the trial court in which he sought to explain his earlier actions vis-à-vis the stay application granted by Judge Jones. The trial court granted Pacifica's motion. Its minute order explained:

> "The ex parte application to vacate the October 26, 2007 order staying all foreclosures is GRANTED. The court finds that the application for a stay contained intentionally false representations. First, Mr. Eardley [appellant] asserted that this application had never been presented to any other judicial officers. The application had, in fact, been presented to Judges Yaffe and Bryant-Deason.
>
> "Further, Mr. Eardley stated that he had notified all opposing counsel of the ex parte application, and that it was unopposed. In fact, defendants received no notice of plaintiff's application and the application is opposed by all lenders.
>
> "As notice was not properly served, the ex parte stay granted on 10/26/07 is vacated.
>
> "Additionally the court grants the request of Pacifica Mortgage for sanctions in the amount of $3,755.00, payable by plaintiff's counsel, within 10 days of this order."

---

[6] At oral argument on this appeal, appellant suggested that he had asked the trial court to continue the hearing on Pacifica's motion to vacate and to impose sanctions because he had not received adequate notice. The record does not support his claim. As noted above, appellant never raised that objection either at the beginning of or during the hearing. The page reference he gave at oral argument reflects only a colloquy that occurred at the very end of the hearing after the trial court had granted Pacifica's motion to vacate and request for sanctions. At that point, appellant asked that "the matter be put over for a hearing on the merits" of his substantive claim that the lenders were prevented from proceeding by way of non-judicial foreclosure because the property owners had recorded Notices of Rescission of Trust Deeds. The trial court replied: "Not when I have been misled. You can set up whatever motions you need, whatever courts you need, with the judge that you need. That would not be me."

That day (Oct. 29), the trial court filed a formal order vacating the October 26 stay and permitting the foreclosure sale to proceed as scheduled.[7] The order also recited: "Plaintiff Michelle Eardley and her counsel Jon Eardley are ordered to pay monetary sanctions in the amount of $3,755" to counsel for Pacifica.

On November 9, the trial court sustained without leave to amend Downey's demurrer to the complaint filed in the first lawsuit.

On November 15, Downey moved to dismiss the second lawsuit because Michelle Eardley and appellant had failed to comply with the requirement of the vexatious litigant statute to receive leave of court before filing the lawsuit. Judge White issued an order to show cause, and, on December 13, conducted a contested hearing at which all parties appeared. Neither appellant nor Michelle Eardley tendered a judicial order permitting them to file either of the two lawsuits. Consequently, Judge White dismissed both lawsuits with prejudice and, pursuant to section 391.7, subdivision (c), entered judgment nunc pro tunc as of November 25 in favor of Downey and Pacifica.[8] On December 18, judgment was formally entered in both lawsuits.

---

[7] The foreclosure sale did not take place on October 29 because Spirtos filed an emergency petition in bankruptcy court.

[8] The statute provides, in relevant part: "The clerk may not file any litigation presented by a vexatious litigant subject to a prefiling order unless the vexatious litigant first obtains an order from the presiding judge permitting the filing. If the clerk mistakenly files the litigation without the order, any party may file with the clerk and serve on the plaintiff and other parties a notice stating that the plaintiff is a vexatious litigant subject to a prefiling order as set forth in subdivision (a). The filing of the notice shall automatically stay the litigation. *The litigation shall be automatically dismissed unless the plaintiff within 10 days of the filing of that notice obtains an order from the presiding judge permitting the filing of the litigation as set forth in subdivision (b).*" (§ 391.7, subd. (c), italics added.)

On December 28, appellant filed a notice of appeal. It reads: "Jon Eardley hereby appeals in its entirety the order entitled as follows: 'Order vacating the October 26, 2007 order staying all foreclosures and awarding monetary sanctions against plaintiff Michelle Eardley and her counsel in the amount of $3,755.'" Appellant attached a copy of the trial court's October 29 order to his notice of appeal. Michelle Eardley never filed an appeal from the October 29 ruling or from the December 18 judgment terminating her lawsuit.[9]

On June 25, 2008, appellant filed a writ of supersedeas to stop the foreclosure sale. We summarily denied it for failure to demonstrate entitlement to relief. Appellant filed a similar request on August 5, 2008, which we also summarily denied.

On August 6, 2008, appellant and his wife conveyed by grant deed their interests in the subject property to Spirtos.

On August 8, 2008, Pacifica foreclosed on the property by way of trustee's sale. (See fn. 7, *ante*.)

DISCUSSION

Appellant's primary contention is a multi-faceted attack on the $3,755 sanctions order imposed in the second lawsuit. We need not reach any of his arguments because, as both Pacifica and Downey point out in their briefs, there is no appealable order.

The right to appeal is completely statutory. (*Powers v. City of Richmond* (1995) 10 Cal.4th 85, 109-110.) An attorney of record has standing to appeal an

---

[9] On June 11, 2008, appellant and Spirtos filed a notice of appeal in the first lawsuit. On February 19, 2009, Division Three of this District granted the respondents' motion to dismiss the appeal. (*Spirtos v. Downey Savings and Loan Association, et. al.*; B208562).

order directing him to pay sanctions "if the amount exceeds five thousand dollars ($5,000)." (§ 904.1, subd. (12).) Here, the contested order fails to meet that financial threshold. We therefore will dismiss the purported appeal from the sanctions order.[10, 11]

Appellant's contrary arguments are not persuasive.

First, he argues that he has an absolute right to appeal because the trial court's order was "clearly void on its face." As set forth in his brief and amplified at argument, appellant urges that the order vacating the stay and awarding sanctions was "void" because he was denied proper notice and an opportunity to be heard. The record refutes that contention. On October 28, Pacifica informed appellant that it intended to file an ex parte application on October 29. Appellant cannot deny having received that notice because not only did he appear at the October 29 hearing but he came armed with two declarations to refute Pacifica's claims. Further, appellant never objected about lack of notice or asked for a continuance. Instead, he engaged in a lengthy exchange with the trial court in an unsuccessful attempt to convince it that he had not intentionally misled it. Under these circumstances, appellant has waived any claim that inadequate notice (assuming it had any merit) resulted in a "void" and therefore appealable order. (See *Reedy v. Bussell* (2007) 148 Cal.App.4th 1272, 1288 ["'[i]t is well settled that

---

[10] Prior to briefing, Pacifica moved to dismiss this appeal as being taken from a nonappealable order. We summarily denied the motion. That summary disposition does not preclude "later full consideration of the issue, accompanied by a written opinion, following review of the entire record and the opportunity for oral argument." (*Kowis v. Howard* (1992) 3 Cal.4th 888, 900.)

[11] This court has discretion to construe the appeal as a petition for extraordinary relief. (§ 904.1, subd. (b).) Putting aside the fact that appellant has not requested us to treat the appeal as a writ application, no extraordinary circumstances present themselves to warrant that course of action.

the appearance of a party at the hearing of a motion and his or her opposition to the motion on its merits is a waiver of any defects or irregularities in the notice of the motion.'"].)

Next, appellant argues that he is also appealing from the portion of the trial court's order that dissolved the prior order staying the foreclosure sales. The argument fails for the fundamental reason that the test for appealability is "twofold—one must be both a party of record to the action *and* aggrieved to have standing to appeal." (*Shaw v. Hughes Aircraft Co.* (2000) 83 Cal.App.4th 1336, 1342.) Appellant was *not* a party to the second lawsuit. The only plaintiff was his wife Michelle Eardley. He therefore lacks standing to contest that order (even assuming it is appealable and has not been rendered moot by appellant's subsequent transfer of his interest in the property and the foreclosure sale, assumptions we do not make.) (See *In Re Marriage of Reese & Guy* (1999) 73 Cal.App.4th 1214, 1223.)

Appellant further argues that he is also appealing from the trial court's December 18 judgment dismissing the second lawsuit based upon his and his wife's failure to comply with the vexatious litigant statute. The record does not support this claim. The notice of appeal filed on December 28 refers only to the October 29 order vacating the stay order and imposing monetary sanctions. It makes no reference to the December 18 judgment. "'[W]here several judgments and/or orders occurring close in time are separately appealable . . . , each appealable judgment and order must be expressly specified—in either a single notice of appeal or multiple notices of appeal—in order to be reviewable on appeal.' [Citation.]" (*DeZerega v. Meggs* (2000) 83 Cal.App.4th 28, 43.) Because the notice of appeal, filed ten days after the judgment was entered, does not specify that the December 18 judgment is being appealed in addition to the sanctions order, we lack jurisdiction to consider appellant's attacks on that

judgment (including his arguments about a purported misapplication of the vexatious litigant statute). (*Unilogic, Inc. v. Burroughs Corp.* (1992) 10 Cal.App.4th 612, 625.)

Finally, appellant claims that on January 4, 2008, he "filed an amended Notice of Appeal to include Judge White's December, 2007 'Judgment Nunc Pro Tunc' dismissing Michelle Eardley's complaint and, again, sanctioning Appellant." The portion of the record he cites—exhibit 16 in the appellant's appendix—does not contain that notice of appeal. It is simply a 4-page case summary for the second lawsuit that the superior court generated on June 16, 2008. It contains no indication that a second notice of appeal was filed. Although Pacifica and Downey each pointed out this evidentiary gap in its respective respondent's brief, appellant's subsequent motions to this court for judicial notice did not include a second notice of appeal. (See fn. 1, *ante*.) We therefore conclude no such notice of appeal was ever filed.

Lastly, we address Pacifica's request that appellant be sanctioned for filing and pursuing a frivolous appeal. Rule 8.276(a) of the California Rules of Court requires a sanctions request to be made in a motion filed separately from a party's brief. The motion "must include a declaration supporting the amount of any monetary sanction sought" and must be filed "within 10 days after the appellant's reply brief is due." (Cal. Rules of Court, rule 8.276 (b)(1) and (b)(2).) Pacifica did not follow that protocol. Its request is simply included in its respondent's brief along with the conclusory claim that appellant caused Pacifica "to incur thousands of dollars in fees and costs to oppose his appeal." We therefore deny Pacifica's request for failure to follow the required procedure. (*Kajima Engineering and Construction, Inc. v. Pacific Bell* (2002) 103 Cal.App.4th 1397, 1402; *Committee to Save the Beverly Highlands Homes Assn. v. Beverly Highlands Homes Assn.* (2001) 92 Cal.App.4th 1247, 1273, fn. 10; *In re Marriage of Petropoulos* (2001)

91 Cal.App.4th 161, 180; and *Leko v. Cornerstone Bldg. Inspection Service* (2001) 86 Cal.App.4th 1109, 1124.)

DISPOSITION

The purported appeal from the trial court's October 29, 2007 order imposing monetary sanctions on Jon Eardley is dismissed. Respondents are to recover their costs. The Clerk of this Court is directed to forward a copy of this opinion to the State Bar of California. (Bus. & Prof. Code, § 6086.7, subd. (a)(3).)

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

WILLHITE, J.

We concur:

EPSTEIN, P. J.

SUZUKAWA, J.